

Plaintiffs' Exhibit 46

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA

3 -----X

4 UNITED STATES OF AMERICA, et al,

5 PLAINTIFF,

6 -against-

Civil 1:23-cv-00108

7 GOOGLE LLC,

8 DEFENDANT.

9 -----X

10 VIDEOTAPED DEPOSITION OF JAMES H. AVERY

11 Robinson Bradshaw

12 1450 Raleigh Road, Suite 100

13 Chapel Hill, North Carolina 27518

14 Wednesday, August 16, 2023

15 10:10 a.m.

16
17
18 Reported by: Cindy A. Hayden, RMR, CRR

19 JOB #: 2023-90795

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25

<p style="text-align: right;">Page 9</p> <p>1 websites. And so I was building websites in high 2 school and then partially through college. Went to 3 Dell, moved up to be a programmer at Dell, and then 4 continued my career as a developer. 5 Q. And where are you currently employed? 6 A. Adzerk or Kevel. 7 Q. Where were you employed prior to Kevel? 8 A. I -- I worked for a company called 9 Infozerk, which was an LLC consulting company that 10 I founded. 11 Q. Did you work anywhere else between Dell 12 and Infozerk? 13 A. No. Wait. No, I'm sorry. Yes. 14 Between -- between Dell and Infozerk, yes. I 15 worked at a company called G.A. Sullivan that was 16 acquired by Avanade. And then I also worked for a 17 company called Schawk, S-C-H-A-W-K, in Cincinnati. 18 Q. So what was your role at Dell? 19 A. I started out as an -- in support and 20 then moved on to be a software developer. 21 Q. And briefly, what were your 22 responsibilities? 23 A. I was basically writing -- building the 24 tools that the support techs used while on the -- 25 on the phone with customers.</p>	<p style="text-align: right;">Page 11</p> <p>1 Q. And who are Kevel's customers, category 2 of customers? 3 A. Yeah, categories? So we work with a 4 lot of marketplaces; e-commerce companies, Fintech, 5 and that includes kind of banks as well as, like, 6 newer Fintech apps. 7 And then we also work with digital 8 at-home companies, and then, you know, I'd say a 9 handful of, like, ad networks. So it's a pretty 10 large variety of customer types. 11 Q. And what is your role at Kevel? 12 A. I'm the CEO. 13 Q. And what are your responsibilities as 14 Kevel's CEO? 15 A. Largely, managing our leadership team, 16 just about whatever -- whatever is asked of me. 17 Q. And how has your role in the company 18 changed since Kevel was founded? 19 A. Yeah. I mean, early on, I was writing 20 a lot of code; I was, you know, very involved in 21 different sales. Now, obviously, as we've gotten 22 larger, I'm less involved. And they don't let me 23 write code anymore. I'm more involved in, you 24 know, the overall management of the company versus 25 the, you know, individual customers or projects.</p>
<p style="text-align: right;">Page 10</p> <p>1 Q. Okay. And at Schawk, what was your 2 role? 3 A. I was software engineer and basically 4 was building a lot of the internal tools they used 5 for, like, imaging preprocessing. 6 Q. And G.A. Sullivan? 7 A. Yeah. G.A. Sullivan I was a 8 consultant, and so I was -- they basically -- we 9 did deals with different companies for us to go 10 build their internal systems for them. 11 Q. And G.A. Sullivan was the consultancy? 12 A. Yeah. Yep. 13 Q. And Infozerk, what was your role? 14 A. Yeah. So I was -- it was basically 15 doing consulting for companies; going in and 16 helping them build, like, large enterprise software 17 programs. 18 Q. All right. Let's turn back to Kevel, 19 or would you prefer that I call it "Adzerk"? 20 A. Either one. 21 Q. Okay. In your current position, so at 22 a high level, what is Kevel's business? 23 A. At a high level, we -- we built a set 24 of APIs that customers use to build ad platforms; 25 so, essentially, an ad-serving API.</p>	<p style="text-align: right;">Page 12</p> <p>1 Q. Did you found Kevel? 2 A. Yes. 3 Q. In your time at Kevel, have you 4 interacted with internet publishers? 5 A. Yes. 6 Q. How often? 7 A. I mean, early on, we were -- like, I 8 was selling to those publishers, you know. Up 9 until today, I still -- like, with some of our 10 larger publishers, we will, you know -- I'll still 11 be involved in -- in talking with large customers. 12 Q. And in your time at Kevel, have you 13 interacted with advertisers, ad agencies or 14 demand-side platforms? 15 MS. MORGAN: Objection to form. 16 BY MS. AGNEW: 17 Q. Let me rephrase. 18 In your time at Kevel, have you 19 interacted with advertisers? 20 MS. MORGAN: Objection to form. 21 BY MS. AGNEW: 22 Q. You can answer. 23 A. Yeah, I'm trying to figure out, like, 24 do -- interact -- we -- we don't work directly with 25 advertisers. We've had discussions with them.</p>

Page 37

1 "us" you refer to here?

2 **A. Kevel.**

3 Q. And what does "Index" refer to?

4 **A. Index Exchange.**

5 Q. And what is Index Exchange?

6 **A. They are a SSP or ad exchange.**

7 Q. And what is an SSP?

8 **A. A supply-side platform.**

9 THE REPORTER: "Supply-side"?

10 **THE WITNESS: Platform.**

11 BY MS. AGNEW:

12 Q. And what does "PubMatic" refer to here?

13 **A. They're another SSP/ad exchange.**

14 Q. Has Kevel integrated with its publisher

15 ad server other ad exchanges, including AdX and

16 PubMatic?

17 **A. Index and PubMatic, not AdX.**

18 Q. Thank you for the correction.

19 So what, if at all, is different about

20 the way that Kevel integrates with Google's ad

21 change compared to how Kevel integrates with other

22 ad exchanges like Index and PubMatic?

23 MS. MORGAN: Objection to form.

24 **THE WITNESS: For Index and PubMatic**

25 **and other ad exchanges, we are able to connect**

Page 38

1 through a protocol called "OpenRTB," which is a

2 server-to-server integration, and we can bring

3 those into an auction. The only option to

4 integrate with AdX has been through AdX tags.

5 BY MS. AGNEW:

6 Q. And what does "OpenRTB" stand for?

7 **A. Open Real-Time Bidding.**

8 Q. And what is a server-to-server

9 integration?

10 **A. That means that our server is calling**

11 **their server as opposed to the connection being**

12 **made from the client browser.**

13 Q. And what kind of integration is

14 available on AdX with AdX tags?

15 **A. Client-side integration.**

16 Q. And what is client-side integration?

17 **A. It means that the call is happening**

18 **from the customer's browser as opposed to from our**

19 **server.**

20 Q. And what effect does that have on the

21 publisher trying to call the exchange?

22 **A. It means that we're not able to run a**

23 **single auction for all of their demand.**

24 Q. But you are able to run a single

25 auction for all demand through a server-to-server

Page 39

1 integration?

2 **A. Correct.**

3 Q. And is that on a real-time basis?

4 **A. Yes.**

5 Q. Did Kevel ever ask Google to integrate

6 Kevel's publisher ad server with AdX in the same

7 way that Google integrated Google's publisher ad

8 server with AdX?

9 **A. Yes.**

10 MS. MORGAN: Objection to form.

11 BY MS. AGNEW:

12 Q. How many times?

13 **A. I can remember at least two.**

14 Q. Do you remember when you asked to

15 integrate with AdX? Or when Kevel -- asked for

16 Kevel to integrate with AdX?

17 **A. One was pretty early on. I want to say**

18 **in the 2012 to 2014 time frame. And then one was**

19 **in the last 12 months.**

20 Q. And why did you ask in the 2012-2014

21 range?

22 **A. Because we wanted to -- we were --**

23 **especially in 2012, we were -- we were still trying**

24 **to compete for traditional publishers. And we**

25 **believed that -- that integration with AdX was**

Page 40

1 essential to be able to compete for traditional

2 publishers.

3 Q. And were you -- did Google integrate

4 Kevel with Google's ad exchange?

5 **A. No.**

6 Q. So when you approached Google about

7 integrating Kevel with AdX, what was Google's

8 response?

9 **A. I remember that they said it doesn't**

10 **work that way.**

11 Q. Was that their response in the

12 2012-2014?

13 **A. 2012-2014.**

14 Q. And what about the more recent approach

15 you made to Google about integration?

16 **A. The more recent approach was**

17 **essentially they -- they weren't aware of any**

18 **integrations done to another ad server and that**

19 **they would have to check internally to see if it**

20 **was possible. And we have not heard back.**

21 Q. And when was the last time you heard

22 from Google?

23 **A. This was months -- months ago.**

24 Q. So what did you think of Google's

25 responses?

Page 41

1 **A. I didn't like them.**
 2 Q. Aside from not liking them, did you
 3 have any other opinion about whether Google had a
 4 valid basis for that response?
 5 **A. I -- I don't know how their internal**
 6 **system works, but I believe that their -- if every**
 7 **other exchange can integrate with us in a**
 8 **server-to-server fashion that it should definitely**
 9 **be technically possible for Google to do the same.**
 10 Q. And what is your basis for saying that?
 11 **A. Just our experience with every other ad**
 12 **exchange and being able to connect in that way.**
 13 Q. What makes you think that Google would
 14 be able to integrate in that way?
 15 MS. MORGAN: Objection to form.
 16 **THE WITNESS: Because I think that**
 17 **they -- like, ad exchanges all work fairly**
 18 **similarly and based around OpenRTB. And they also**
 19 **do connect on pushing demand out to other**
 20 **exchanges, just not from the supply side.**
 21 BY MS. AGNEW:
 22 Q. What is your understanding of how
 23 technically challenging it would be for Google to
 24 integrate AdX with Kevel's publisher ad server in
 25 the same way that Google integrates Google's ad

Page 42

1 exchange with Google's publisher ad server?
 2 MS. MORGAN: Objection to form.
 3 **THE WITNESS: I don't know.**
 4 BY MS. AGNEW:
 5 Q. Has integrating with other exchanges
 6 with Kevel's publisher ad server been technically
 7 challenging?
 8 **A. No.**
 9 Q. Okay. Let's move back to the document.
 10 I am looking now on the same page on
 11 the same email on Page 2, which you wrote to
 12 Ms. Sluis on April 24th, 2019, at 10:17 p.m.
 13 Do you see that email?
 14 **A. Yes.**
 15 Q. Here you write, quote: Almost every ad
 16 server has gone out of business because of this
 17 integration between AdX and Ad Manager. Publishers
 18 may want to use another ad server but they would
 19 end up giving up a chunk of revenue from AdX. It
 20 turns out monopolies are pretty effective, close
 21 quote.
 22 Did I read that correctly?
 23 **A. Yes.**
 24 Q. What does the "integration between AdX
 25 and Ad Manager" refer to?

Page 43

1 **A. The integration between AdX and Google**
 2 **Ad Manager.**
 3 Q. And what does the word "monopoly" refer
 4 to here?
 5 **A. The -- essentially, the position that**
 6 **Google Ad Manager has in the publisher market.**
 7 Q. Is that in the publisher market or the
 8 publisher ad server market?
 9 MS. MORGAN: Objection to form.
 10 **THE WITNESS: Publisher ad server**
 11 **market.**
 12 BY MS. AGNEW:
 13 Q. Thank you.
 14 And why do you view Google's publisher
 15 ad server GAM as being a monopoly in the publisher
 16 ad server market?
 17 MS. MORGAN: Objection to form.
 18 **THE WITNESS: I think they have -- they**
 19 **have over -- you know, over 90 percent or more of**
 20 **publishers are using GAM. But --**
 21 BY MS. AGNEW:
 22 Q. Why do you say that publishers would
 23 have to give up a chunk of revenue from Google's
 24 ad exchange if publishers chose to not use Google's
 25 publisher ad server?

Page 44

1 **A. Because of the -- the tight integration**
 2 **with AdX and the fact that other ad servers,**
 3 **including Kevel, can't integrate with AdX in the**
 4 **same way that GAM integrates with AdX.**
 5 Q. You also refer to other publisher ad
 6 servers as going out of business. Which publisher
 7 ad servers have gone out of business in the past
 8 five to ten years?
 9 **A. The -- I believe the ones I was**
 10 **referring to here were -- OpenX closed their**
 11 **ad-serving product, and they're only now an**
 12 **ad exchange. OAS, which may have had a different**
 13 **name, which used to be a publisher ad server, had**
 14 **closed down. And then AppNexus also closed part of**
 15 **their publishing ad server platform.**
 16 Q. Do you know why those publisher ad
 17 servers have gone out of business?
 18 MS. MORGAN: Objection to form.
 19 **THE WITNESS: I can only speculate.**
 20 BY MS. AGNEW:
 21 Q. To the best of your knowledge, why have
 22 those publisher ad servers gone out of business?
 23 MS. MORGAN: Objection to form.
 24 **THE WITNESS: Because the majority of**
 25 **publishers choose to work with GAM, largely based**

Page 97

1 links between DFP, AdX and AdWords?
2 **A. Yeah, I think it --**
3 MS. MORGAN: Objection to form.
4 **THE WITNESS: I think it makes it**
5 **almost impossible for publisher ad servers to**
6 **compete against GAM in the market.**
7 BY MS. AGNEW:
8 Q. And at the time you wrote this tweet,
9 had you spoken to the DOJ?
10 **A. I don't believe so.**
11 Q. So you were critical of the links
12 between DFP, AdX and AdWords before speaking with
13 DOJ?
14 **A. Yes.**
15 MS. MORGAN: Objection to form.
16 **THE WITNESS: Yes.**
17 BY MS. AGNEW:
18 Q. So earlier today you said that, to
19 summarize, the links between DFP, AdX and AdWords
20 have negative effects, correct?
21 **A. Yes.**
22 MS. MORGAN: Objection to form.
23 BY MS. AGNEW:
24 Q. Was today the first time you have said
25 that the links between DFP, AdX and AdWords have

Page 98

1 negative effects?
2 **A. No.**
3 MS. AGNEW: I'm going to ask to go off
4 the record again.
5 **THE VIDEOGRAPHER: Off record at**
6 **12:44 p.m.**
7 * * *
8 (Whereupon, there was a recess in the
9 proceedings from 12:44 p.m. to 12:48 p.m.)
10 * * *
11 **THE VIDEOGRAPHER: On record at**
12 **12:48 p.m.**
13 BY MS. AGNEW:
14 Q. So, Mr. Avery, I'd like to return to
15 Avery Exhibit 1, the document with Bates ending in
16 945.
17 **A. Okay.**
18 Q. So we've discussed this document
19 before, and I just wanted to draw your attention
20 back to the statement you made at the very top
21 email on Page 1 of the exchange, which I will read
22 again for the record.
23 MS. MORGAN: I'm just going to object
24 that this outside the scope of the cross, so it's
25 not proper material for redirect.

Page 99

1 BY MS. AGNEW:
2 Q. Here you write, quote: People are
3 doing banner ads are so tied to GAM it's not even
4 funny, close quote.
5 **A. Yes.**
6 Q. Did I read that correctly?
7 **A. Yes.**
8 Q. When you wrote this email, had you
9 spoken with the DOJ?
10 **A. I don't believe so.**
11 MS. AGNEW: All right. I pass the
12 witness.
13 MS. MORGAN: I have no further
14 questions for you today, Mr. Avery.
15 Congratulations, you're done.
16 I think we can go off the record.
17 **THE VIDEOGRAPHER: This concludes**
18 **today's deposition of James Avery. The time is**
19 **12:49 p.m. We are now off record.**
20 **(Deposition concluded at 12:49 p.m.)**
21 **(Signature reserved.)**
22
23
24
25

Page 100

1 SIGNATURE OF DEPONENT
2 I, the undersigned, JAMES H. AVERY, do
3 hereby certify that I have read the foregoing
4 deposition transcript and find it to be a true and
5 accurate transcription of my testimony, with the
6 following corrections, if any:
7
8 PAGE LINE CHANGE
9 _____
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24 _____
25 JAMES H. AVERY

CERTIFICATE OF REPORTER

I, Cindy A. Hayden, Registered Merit
Reporter and Notary Public for the State of North
Carolina at Large, do hereby certify:

That the foregoing deposition was taken
before me on the date and at the time and location
stated on Page 1 of this transcript; that the
deponent was duly sworn to testify to the truth,
the whole truth and nothing but the truth; that the
testimony of the deponent and all objections made
at the time of the examination were recorded
stenographically by me and were thereafter
transcribed; that the foregoing deposition as typed
is a true, accurate and complete record of the
testimony of the deponent and of all objections
made at the time of the examination to the best of
my ability.

I further certify that I am neither related
to nor counsel for any party to the cause pending
or interested in the events thereof. Witness my
hand, this 16th of August, 2023, at Concord,
Cabarrus County, North Carolina.

Cindy A. Hayden

Cindy A. Hayden,
Registered Merit Reporter
Notary Public
State of North Carolina at Large
My Commission expires:
April 7, 2027

HIGHLY CONFIDENTIAL

ERRATA SHEET FOR THE TRANSCRIPT OF JAMES AVERY

Case Name: In Re: Google Antitrust Investigation

Dep. Date: August 16, 2023

Deponent: James Avery

Page	Line(s)	Correction	Reason for Correction
37	21	Change “change” to “exchange”	Transcription error